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Residential
Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A & 20C OF THE LANDLORD & TENANT ACT 1985

Ref: LON/00AC/LSC/2010/0560

Property:	13 Victoria Close New Barnet EN4 9NY
Applicant:	Mr Gordon J Adam
Represented by:	Christine Adam & Clive Dacre
Respondent:	Dobern Properties Limited
Represented by:	Ms J Lee, Counsel
In Attendance for Respondent:	Mr Leslie Kingston Mr Robert Kingston
Date of Hearing:	23rd November 2010
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister, Chairman Mr T Johnson, FRICS Mr D Wills
Date of Decision:	10th January 2010

Summary of Decision

The Tribunal has no jurisdiction in relation to the years 2005-2008 inclusive, since these service charges for buildings insurance have been agreed. The premium payable for the year 2009/10 is £360.91. The application in respect of administration charges was withdrawn.

Preliminary

1. The Applicant is the holder of the leasehold interest in the subject premises, a 2 bedroom maisonette in a purpose built block of 4

maisonettes on a development of similar blocks. The Respondent is the freeholder of this block and another on the development. The management company is Dobern Property Management (the trading name of Goldmine Associates Ltd). The lease demises the subject premises for a term of 120 years from 25th December 1973, and the tenant covenants with the landlord under clause 2(b):

"To pay throughout the said term and by way of additional rent one half of the total amount which in each year of the said term the Landlord shall expend by way of premium in effecting and maintaining the insurance referred to in Clause 4(i) hereof such additional rent to be paid forthwith on demand."

2. The Landlord covenants under clause 4(i) to keep the property insured "to the full replacement value thereof". Other than above, there is no provision in the lease for a contribution towards service charges, and the repairing obligations lie with the tenant.

3. The Applicant applied for a determination under Section 27A of the Landlord and Tenant Act 1985 as amended challenging the reasonableness and/or liability to pay service charges for buildings insurance, as well as administration charges, for the year 2009/10. Previous proceedings for a determination under Section 27A of the Act (case number LON/00AC/LSC/2009/0486), in respect of buildings insurance for the period from 2005 – 2008 inclusive had been withdrawn.

4. The Tribunal issued directions on the present application on 7th September 2010 at an oral pre trial review, at which the Applicant appeared in person and the Respondent was represented by Mr R Kingston, Director of Goldmine Associates Limited. In those directions the Chairman recorded:

"The parties stated that previous proceedings had been commenced in the County Court in 2009 relating to insurance premiums for the insurance years 2005 to 2008. The proceedings had been transferred to the LVT, and a date fixed for hearing. The case had then been withdrawn when the parties had been under the mistaken impression that they had

reached a binding settlement agreement on the then outstanding issues. That agreement had not been recorded in writing or successfully concluded. The Tribunal chairman therefore ruled that the insurance items in dispute from 2005 onwards should be added to this application."

5. The hearing of the present application took place on 23rd November 2010, at which the Tribunal considered as a preliminary issue its jurisdiction to make a determination in respect of insurance premiums for the period 2005-08, having heard representations from both parties.

Jurisdiction in relation to the period 2005-08

6. Mr Adam had been represented in the previous proceedings by his son-in-law Mr Gratton, and there was no dispute as to his authority to have entered into a settlement on Mr Adam's behalf. Contrary to the impression apparently given to the Chairman at the pre trial review, there was in fact no issue between the parties that there had indeed been an agreement in respect of those previous proceedings. That agreement was in the form of an email from Ms Susan Wright, solicitor at Maddersons (acting for the landlord), to Mr Gratton dated 30th October 2009 and his reply dated 31st October 2009, acknowledged by her response dated 2nd November 2009 in which she confirmed she had withdrawn the application. The enumerated terms proposed by Ms Wright and agreed by Mr Gratton were:

   i. That Mr Adam pay half of the insurance premium due and outstanding for the 2008 charges.

   ii. That Mr Adam pay the ground rent in full.

   Iii. That Mr Adam sign a confidentiality agreement

7. The first 2 terms were complied with. The agreement did not specify the terms of the confidentiality agreement, and no such terms were ever proposed by the landlord. Ms Wright's email of 30th October 2009 also stated in a separate and unnumbered paragraph:

"I confirm that the offer does not affect payment of the December 2009 insurance premium which the clients expect to be paid in full. It is understood however, that your father-in-law will use his best endeavours to obtain alternative like for like insurance quotations, which if received and the risk accepted before payment of the 2009 charges and the clients are able to cancel the present insurance will in all Lakewood [sic] be accepted by the clients."

8. Mr Adam appears to have been under the impression that the agreement reached had been verbal, and thus the Chairman at the pre trial review had not been informed of the existence of a written agreement. The parties having reached an agreement as set out in the emails, the previous Tribunal proceedings Tribunal were withdrawn.

9. There is no dispute that, as set out in a letter from Madderson's solicitors of 28th September 2010, part payment was accepted for the years 2005-2008. Ms Lee on behalf of the Respondent argued however that this was on the basis of a further express and fundamental term of the agreement set out in the email dated 30th October 2009 regarding payment of the December 2009 premium, namely that Mr Adam pay that charge in full, and that this term had been breached. Ms Lee contended that the Tribunal had jurisdiction in respect of the years 2005-08 because of the failure of Mr Adam to comply with this fundamental term of the agreement, and alternatively that if the agreement is binding then he is bound also by a term to pay the 2009 insurance charges in full and in relation to them the Tribunal therefore, by virtue of section 27(4A), had no jurisdiction. Mr Dacre said Mr Adam did try to get alternative insurance quotations as intended, but produced no evidence of this.

Determination on the Preliminary Issue

10. The Tribunal finds against the Respondent on the preliminary issue, being quite satisfied that there is nothing in the wording of the agreement that could constitute a term of settlement as to the 2009 insurance within the compromise of the previous proceedings, or which could prevent an application in relation to that year under s.27A(4). The terms of the

agreement are those numbered i-iii in the email of 30th October 2009. The additional matters in the further paragraph in that email relating to the 2009 insurance premium did not form part of the agreement. The wording of the email is clear as to this, in that it is expressly stated that it "does not affect payment of the December 2009 insurance premium". The parties expressed an intention to use a method of reaching a premium for that year which would involve the Applicant obtaining like for like quotations. The Respondent says he has not done so. However, this intention was not a contractually binding term. It was merely the Respondent's understanding that this would be done, and an expectation that there would accordingly be no further dispute as to the future insurance premiums.

11. In any event the Tribunal finds that, if the additional content of the email of 30th October was a term proposed by the Respondent, it was not agreed in the reply of 31st October. The proceedings were nevertheless withdrawn and in an email from the Respondent's solicitor dated 2nd November she said "I confirm I have today telephoned the Tribunal to make them aware of the agreement reached".

12. By virtue of section 27A(4) the Tribunal therefore has no jurisdiction to consider the years 2005–2008 as they have been the subject of an agreement. The Tribunal Chairman on issuing directions did not make a finding to the contrary (and, since he sat alone, did not have the power to do so in any event by virtue of schedule 10 of the Rent Act 1977). He had not had sight of the emails constituting that agreement. The Tribunal can only determine the insurance for the year specified in the application and demanded in December 2009. Accordingly, having given an immediate oral determination on the preliminary issue, it heard evidence and argument from the parties only on the insurance for that single year.

Evidence regarding Insurance demanded in December 2009 and administration charges

13. The premium demanded from the Applicant by the Respondent for the year was £552.16 (£2208.64 for the block, insured with Aviva through

broker HC&F), based on a sum insured per maisonette of £191,238. The Respondent was directed to provide insurance premium receipts. In spite of objection by the Applicant, the Tribunal is satisfied this direction was complied with by the production of an Aviva property schedule bearing policy number PM017575CHC and the address of the subject premises, and that the Respondent has paid the premium in question.

14. Ms Adam and Mr Dacre on behalf of the Applicant sought to rely on independent valuation evidence in order to show that the insurance cover for the building was based on a grossly overvalued rebuilding cost. The permission of the Tribunal to rely on expert witness evidence had not been sought in advance. The report of Mr Welch, chartered surveyor, was dated 24th September 2010, but there was a mistake as each of the 4 flats had been valued at £125,000, making total £600,000, and an amended report showing a total valuation of £500,000 had been produced in clarification. The Respondent had not instructed an expert and Ms Lee initially objected to the Applicant's reliance on the report, served on 11th October 2010, Mr Welch not being at the hearing to be cross examined on a number of perceived inconsistencies. This objection was effectively withdrawn by the Respondent's subsequent invitation to the Tribunal during the course of the hearing to accept the valuation of Mr Welch.

15. Ms Adam and Mr Dacre produced documentary evidence that some other identical blocks in the development were paying much less for insurance – including £401.10 in respect of flats 21 and 22 Victoria Close combined, and £212 in respect of a policy for Flat 4 alone. They also produced cheaper alternative insurance quotations from brokers (based on the current sum insured) as follows:

Broker	Insurer	Block premium	Unit premium
Tysers	Axa	1164.64	291.16
HFIS	Allianz	1119.72	279.93

16. There was dispute between the parties as to the relevance of what the Respondent considered to be a history of subsidence at the block. There were 2 relevant claims. Firstly, the property had apparently been underpinned in the 1970s and secondly a claim in respect of subsidence had been made to the insurers in 2003. In obtaining quotations, Mr Dacre had told Tysers verbally about the 2003 incident, but as that broker did not think it was relevant (as it was not within the last 3-5 years), Mr Dacre did not tell HFIS when getting his other quotation. He also considered it doubtful, in spite of the 2003 claim, that there had indeed been subsidence affecting the block. The total excess of £1000 shared between the 4 flats was not the higher excess for a subsidence claim. Mr Dacre observed that a Certificate of Structural Adequacy issued by Cunningham Lindsey after repair works in respect of cracking to external and internal walls was undated.

17. Mr Robert and Mr Leslie Kingston, directors, both gave evidence according to their signed witness statements. It was the Respondent's case that the property was properly insured for the amount of the mortgage insurance valuation obtained prior to purchase of the block, adjusted annually for inflation. Mr Robert Kingston gave evidence that, having purchased the freehold of the property in the mid 1980s without a survey, the Respondent was not aware that the property had been underpinned in the 1970s until Mr Adam produced documentary evidence of that within the present proceedings. There had been a subsidence claim in 2003, when the subsidence excess was £1000 (it was subsequently increased). The insurers had instructed Cunningham and Lindsay, whose conclusion that the problem was clay shrinkage must relate to that incident and not an earlier one, since the letterhead on the undated report referred to them as "The British Insurance Awards Winner 2005", and the report referred to a period of observations of cracks ending September 2004. Mr Kingston said that the fact of subsidence in one block in Victoria Close would be a matter that ought to be disclosed to insurers of all of the blocks in the close, and the Applicant could not show that this had been the case in respect of the cheaper quotations obtained.

18. It was the Respondent's case that the property had continually been insured with the insurer who paid out in 2003, under a block policy covering 90 properties (approximately 350 flats) which did not include terrorism cover. An email was produced to show that subsidence cover had recently been refused by one of the alternative brokers approached by the Applicant for a quotation, owing to the claims history of the block. The other identical block on Victoria Close owned by the Respondent was said to be insured for the same cost as the Applicant's block, but had not to the knowledge of Messrs Kingston suffered subsidence in 2003.

19. Mr Leslie Kingston, an insurance broker himself for 49 years, gave evidence that he arranged the insurance for Dobern Properties Ltd himself. He rents a desk in the offices of the broker HC&F, in which he said he had no financial interest. He put all his business through HC&F, who complied with FSA requirements on his behalf, and paid them a commission. He said no commission was paid by him or by HC&F in relation to the insurance of the subject property, and his consultancy agreement does not prohibit him using other brokers (he said under cross examination that when he had tried to find cheaper insurance for the subject property a few years previously, but had only obtained the exact same quotation from Aviva). He also relied on evidence of a letter from HC&F dated 28th September 2010 to show that this broker had tried to obtain individual cover for the block in question at a cheaper cost but had failed.

20. Mr Leslie Kingston's experience was that the holding insurer at the time of a claim for subsidence would continue to offer "full" insurance cover for the property, but any new insurer would usually offer terms excluding subsidence cover. He was aware Legal & General would give full cover where there had been no incidence of subsidence for a period of 15 years. He was sure that Tysers, who had asked for a full structural engineer's report in order to consider providing subsidence cover, would not be able to provide cheaper cover even if the Respondent incurred the significant expense of obtaining such a report.

21. Ms Lee referred the Tribunal to the decision of the LVT dated 14th June 2010 in the case of 36 Birnam Rd, reference LON/00AU/LSC/2010/0248, in which Dobern Properties Ltd. was the Respondent, and in which the insurance premium (under a different block policy since amalgamated with that which includes 13 Victoria Close) was found to be reasonable. It was confirmed on behalf of the Respondent that a complete statement of rights and obligations had not been issued in respect of the service charge demands to date, owing to an administrative error. A copy had been sent since the issue of these proceedings. Accordingly, the Respondent waived the administration charges that had been invoiced in respect of non-payment. The Respondent considered it unlikely that the lease allows for the recovery of the legal costs of these proceedings through a service charge, and did not oppose the tenant's application under s.20C of the Act.

22. The Respondent was unwilling to incur the cost of obtaining an independent expert insurance valuation for the block, owing to concerns it would not be recoverable from the lessees under the terms of the Lease, and preferred to accept the valuation of £500,000 in the report of Mr Welch. The Tribunal gave an oral direction at the hearing that any expert evidence from Respondent as to reinstatement valuation for insurance purposes must be served on the Tribunal by Friday 17th December 2010, having been previously served on Mr Adam, together with the parties' agreement as to the appropriate reinstatement value for the purposes of these proceedings. No such valuation or agreement was provided.

23. Copy correspondence between the parties was received by the Tribunal after the hearing, on 5th January 2011, but the Respondent has not produced expert valuation evidence. Further correspondence was provided from Mr Welch in support of his valuation approach. The Respondent accepted Mr Welch's valuation. The Applicant produced a copy of the insurance policy schedules ending December 2003 and 2004 showing that, contrary to the oral evidence given on behalf of the Respondent at the hearing, the subsidence excess at that time had been £2500 (in contrast to the excess of only £1000 applied to the claim).

Tribunal's Determination

24. The provisions of Clause 2(b) of the Lease are indeed limited, and this Tribunal is not considering an application by any party as to the recoverability of the cost of an insurance revaluation under that Clause. Accordingly it has no jurisdiction to bind any future Tribunal, but considers that on a purposive construction reasonable revaluation costs in identifying the full replacement value of the property ought to be recoverable as a necessary cost of the insurance premium. The landlord is aware of the Tribunal's power in any event upon application to vary a lease upon specified grounds (section 35 Landlord and Tenant Act 1987).

25. The Landlord covenants to insure the property for the full replacement value. The Tribunal was not persuaded that the Respondent reasonably relied on a mortgage valuation obtained on purchase of the property, which was a valuation to protect the mortgage company's loan, made against the market value of the property, and not of the building's reinstatement value. Paragraph 15.16 of the RICS Service Charge Residential Management Code recommends regular reinstatement valuations are obtained by a qualified valuer, usually before the annual renewal date. No such valuation has been obtained in respect of this property. In light of the invitation of the Respondent to accept the valuation of Mr Welch, and in the absence of preferred or alternative valuation evidence, for the purposes of this determination the Tribunal finds that the building should have been insured for a rebuilding cost of £500,000. It is currently insured however for £191,238 (approximately £765,000), the premium being £552.16 per flat. The Tribunal on the present evidence is therefore satisfied that the building is over-insured and the cost of insuring the excess above £500,000 is not reasonably incurred. Applying a pro rata reduction the Tribunal finds that the premium payable is £360.91.

26. Except as above, the Tribunal was not persuaded by the Applicant's arguments that the insurance of the building was unreasonable or the cost unreasonably incurred. The Tribunal does not conclude on the

evidence that there was somehow a flaw or impropriety in the manner in which the building is insured, or that the cost is outside of the reasonable market range.

27. The Tribunal is persuaded by the weight of evidence that a claim was paid in 2003 in respect of subsidence. It notes the value of the excess applied, but is satisfied that the report of Cunningham Lindsay commissioned by the insurer concludes there has been subsidence and does indeed relate to the claim in question. In any event, the current premium was offered by the same insurer that had handled the 2003 claim, on the basis of the claims history. The Tribunal did not agree with the Applicant's argument that it was improper to conclude this property did not have a subsidence claim history. In these circumstances the Tribunal accepts that some insurers will not wish to offer insurance at all, and that the evidence of homeowners' insurance on other similar blocks is of limited relevance in the absence of particulars of matters disclosed and as to the precise cover provided. The Applicant did not demonstrate that the level of cover provided for in his quotations was comparable to that specified in the lease (which requires cover for 2 years loss of rent).

28. In any event, that cheaper cover may be available elsewhere is not sufficient to demonstrate that the insurance premium charged by the landlord is unreasonable. It is not necessary for a landlord to obtain the cheapest insurance quotation. The leading case (of which the Applicant's representatives were made aware by the Tribunal) is Berrycroft Management Limited –v- Sinclair Gardens Investments Limited [1997] 1 EGLR 47. The Court of Appeal held that there was no implied covenant that the sum charged by the insurers should be reasonable or that a tenant should not be required to pay a substantially higher sum than he could himself arrange. The Tribunal is satisfied that as a matter of law the Respondent is entitled to seek insurance for this property as part of a large portfolio of properties of varying degrees of risk, and that there are sound business reasons for doing so. This is fairly large landlord and it makes commercial sense to have block policy in place. There was insufficient evidence that the premium was unreasonable or excessive

(other than with respect to the sum insured) and the Tribunal finds the proportion of the premium paid representing a sum insured of £500,000 is recoverable as a service charge.

29. The Tribunal makes a final point. By compromising the question of the sum insured in these proceedings the Respondent may not succeed in avoiding the potential for dispute if it intends (as it apparently does) to rely on Mr Welch's valuation in future years. It is the landlord's express duty under the lease to insure for the full reinstatement value, and thus the landlord's duty to identify the full reinstatement value. In the opinion of this Tribunal that duty should be discharged based on expert valuation advice obtained by the landlord, not by adopting the professional advice obtained by others merely because there is thereby no cost involved for the Respondent. Mr Welch has no duty to the landlord and his professional indemnity insurance will not cover claims against the landlord made by any tenant in the event that the property is in fact under-insured. The unopposed application under s.20C was granted.

Signed .....

Dated 10th January 2011